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90363—38——1

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. —

DAN B. SHIELDS, INDIVIDUALLY AND AS UNITED STATES ATTORNEY FOR THE DISTRICT OF UTAH, AND INTERSTATE COMMERCE COMMISSION, PETITIONERS

v.

THE UTAH IDAHO CENTRAL RAILROAD COMPANY, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General and the Interstate Commerce Commission pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered on April 1, 1938 (R. 327), affirming a decree of the District Court for the District of Utah enjoining the petitioner Shields, United States Attorney for the District of Utah, from enforcing the provisions of the Railway Labor Act against respondent, and declaring that respondent is an interurban electric railway exempt from the Railway Labor Act.

OPINIONS BELOW

The District Court entered no opinion. The opinions of the Circuit Court of Appeals (R. 327–342) have not yet been reported. The opinion of the Interstate Commerce Commission (R. 314–325) is reported in 214 I. C. C. 707.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 1, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether and to what extent a determination by the Interstate Commerce Commission that a carrier is not an interurban electric railway within the meaning of the exemption proviso in Section 1, First, of the Railway Labor Act, as amended June 21, 1934, is binding upon the courts, and whether the courts may determine the question *de novo* without giving any weight to the decision of the Commission.

2. Whether the determination by the Interstate Commerce Commission, that the Utah-Idaho Central Railroad Company is not an interurban electric railway is arbitrary, capricious, or without substantial evidence to support it.

STATUTE INVOLVED

The section of the Railway Labor Act (48 Stat. 1185, c. 691, 45 U. S. C., § 151–163) primarily in-

olved is the proviso in Section 1 exempting cer-
ain interurban electric railways from the defini-
ion of carrier. Section 1, in so far as material to
his proceeding, reads as follows:

SECTION 1. When used in this Act and for the purposes of this Act—

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing

whether any line operated by electric power falls within the terms of this proviso.

Section 2, Eighth, which is the only provision of the Act which the record shows respondent to be violating, reads as follows:

> Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Section 2, Tenth, which prescribes criminal penalties for the violation of Section 2, Eighth, reads in part as follows:

> Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both

fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof * * *.

STATEMENT

On October 1, 1934, the National Mediation Board requested the Interstate Commerce Commission to determine whether the Utah Idaho Central Railroad Company comes within the terms of the proviso exempting certain electric railways from the operation of the Railway Labor Act (R. 40, 54, 266, 314). The Commission designated an Examiner to hold a hearing and take testimony, and a hearing was held in Ogden, Utah, at which testimony was introduced by the railroad company (Plaintiff's Ex. 49, R. 266–313). The proposed report of the Examiner was submitted to the carrier, exceptions were filed with the Commission, and oral argument held before Division Three of the Interstate Commerce Commission (R. 314–

315). On March 18, 1936, the Commission handed down its opinion (214 I. C. C. 707; R. 314–325), in which it found that the respondent was not an interurban electric railroad within the meaning of the exempting proviso.[1]

The report of the Commission and the evidence adduced before it showed that the Utah Idaho Central Railroad is an electric railway connecting points in Utah and Idaho. The main line is 94 miles long, and there are two branch lines, seven and 14 miles long, respectively. The principal cities served are Ogden, Brigham, and Logan, Utah, and Preston, Idaho (R. 316–317). The road carries freight, passengers, mail, and express (R. 319).

Respondent has many of the physical characteristics of an interurban railroad. Its tracks on the whole are of lighter weight (R. 284–285), its grades slightly steeper (R. 285), its curves sharper (R. 285), its stations and side-tracks more frequent (R. 285–286, 295–296), its motive power of less capacity (R. 281–282), its side-tracks shorter than is customary on trunk line railroads (R. 285–286, 215). Approximately one-fifth of its mileage is located in public streets or highways in cities, towns,

[1] The Commission found that none of the stocks or bonds of respondent was owned by any steam railroad, and that "The only issue therefore is whether it is a street, interurban, or suburban railway within the meaning of the proviso" (214 I. C. C. at 708, R. 315). This case does not raise, therefore, any question as to the relationship of respondent to "a" or "the" steam-railroad system of transportation.

and villages; the remainder on private right-of-way (R. 286–287). The passenger business of respondent is operated in the same manner as that of any interurban electric railway (R. 319).

But the respondent is predominantly a carrier of freight. Even when the road was first completed in 1916, freight revenues were substantial (I. C. C. Ex. 26, R. 229), and since 1918 freight revenues have exceeded passenger revenues (*ibid.*). During the five years from 1930 to 1934, inclusive (the last years for which figures were introduced in evidence), the total freight revenues constituted more than 80% of the total revenues of the carrier (R. 229, 321).[2] In 1934 passenger revenues were only

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[2] Exhibit 26, introduced before the Interstate Commerce Commission (but not before the court below except as a part of the record before the Commission, plaintiff's Ex. 49), shows that passenger and freight revenues from 1925–1934 were as follows (R. 229):

	Passenger	Freight
1925	$244,605.97	$459,995.64
1926	211,763.20	428,314.70
1927	178,175.39	493,562.82
1928	161,688.76	526,516.72
1929	146,554.60	490,455.81
1930	115,545.03	465,421.41
1931	89,632.57	396,357.89
1932	67,410.45	372,474.35
1933	61,429.99	391,718.19
1934	61,346.25	378,934.25

The above figures exclude baggage revenues, mail revenues, express revenues, milk revenues, freight-switching revenue, and miscellaneous transportation revenues, none of which were substantial.

16.2% of freight revenues, and only 13.7% of total transportation revenues.[3]

In 1934 the respondent operated an average of 12.7 passenger cars per day as compared to 47.7 freight cars.[4] The average number of cars per freight train in 1934 was 6.2 (R. 221). The freight carried consisted in the main of beets, sugar, potatoes, sand and gravel, milk, canned goods, tomatoes, cattle, coal, gasoline, and lumber (R. 233-234)—commodities which obviously are not ordinarily carried by interurban railways. Approximately 64% of the freight handled was interchanged with other carriers (computed from Plaintiff's Exhibit 28, R. 233-234; cf. R. 319); approximately one-half of the freight so interchanged moved to or from points in other states (R. 233, 234, 320).[5]

This traffic moved almost entirely in standard freight equipment furnished by connecting railroads (R. 283, 320). Interchange connections were maintained with the Oregon Short Line, the Union Pacific, the Southern Pacific, and the Denver and Rio Grande (R. 313, 320). Respondent is a party

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[3] Computed from Exhibit 26 introduced before the Commission (R. 229).

[4] These figures are computed by multiplying the average number of cars per train (R. 221) by the average number of trains per day (R. 210). Cf. R. 319.

[5] Respondent does not deny that it is engaged in interstate commerce. Its line connects points in Utah and Idaho, and a substantial portion of its freight traffic is interstate.

to practically all of the tariffs publishing through freight rates to or from its territory, and its interchange traffic generally moves on joint rates (R. 312, 320).

Respondent owns seven electric locomotives, which are used to haul its freight traffic; 173 freight cars, 99 of which are interchangeable with steam railroads; and only 22 passenger cars, including passenger motor cars (R. 165, 283, 320).

On the basis of this evidence the Commission found that respondent was not an interurban railroad.

After the decision by the Interstate Commerce Commission, the National Mediation Board ordered the respondent to post the formal notice prescribed by Section 2, Eighth, of the Act (R. 138). The carrier refused to post the notice (R. 138). Instead, on June 24, 1936, it brought this suit against the United States Attorney, praying for a declaratory judgment and an injunction against enforcement of the Railway Labor Act (R. 17–32). In addition to claiming that it was an interurban electric railway, and accordingly not subject to the Act, the carrier alleged that the Act was in many respects unconstitutional (R. 23–26, 29–32). The United States Attorney, in his answer, denied the charges of unconstitutionality and alleged that the determination of the Interstate Commerce Commission, already referred to, was conclusive, since it was not arbitrary or capricious and since it was

based upon substantial evidence (R. 32–36). The Interstate Commerce Commission, by leave of court, intervened as party defendant, and filed a similar answer (R. 39–41).

The District Court, overruling objections by petitioners, permitted respondent to try *de novo* the question already determined by the Commission (R. 83, 111), and respondent then introduced, as original evidence, testimony most of which was along substantially the same lines as the evidence before the Commission (R. 77–141).* The petitioners then introduced the report of the Commission (R. 314–325), and respondent introduced the record made before the Commission (R. 266–313).

The court found, on the basis of the evidence introduced before it and of the evidence before the Commission, that respondent was an interurban electric railway (R. 67, 147). The court did not find that the conclusion reached by the Commission was arbitrary, capricious, or not based upon sub-

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*The exhibits introduced in the court below which were not in evidence before the Interstate Commerce Commission are Exhibits 8, 27–1, 27–2, 27–3, 28, and 29–48, R. 166, 231, 232, 235–266. The court below took judicial notice of Exhibits 29, 30, and 31, which are publications of the Interstate Commerce Commission; they are not printed in the record. Exhibits introduced before the Commission which were not in evidence before the district court, except as a part of the record made before the Commission, are found at R. 229, 233, 234, and are numbered Exhibits 26 and 28 (their numbers before the Commission). There are thus two different sets of exhibits numbered 26 and 28.

stantial evidence, but only that it was "contrary to law." *Cf.* R. 67 and R. 149–150. The court thereupon granted an injunction against enforcement of the Act against respondent by the United States Attorney (R. 68–69). In view of its decision that the Act did not apply to respondent, the court did not pass upon any of the constitutional questions raised.

The decision of the District Court was affirmed by the Circuit Court of Appeals, Judge Bratton dissenting (R. 327–342).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In failing to hold that the determination by the Interstate Commerce Commission that respondent was not an interurban electric railway was binding upon the courts.

2. In failing to hold that the determination by the Interstate Commerce Commission that respondent was not an interurban electric railway was binding upon the courts unless arbitrary, capricious, or not supported by substantial evidence.

3. In failing to hold that the determination by the Interstate Commerce Commission that respondent was not an interurban electric railway was not arbitrary, capricious, or unsupported by substantial evidence.

4. In failing to hold that the District Court erroneously admitted into evidence and relied upon

testimony as to respondent's status which was not included in the record before the Interstate Commerce Commission.

5. In holding that respondent was an interurban electric railway.

6. In holding that respondent was exempt from the Railway Labor Act.

REASONS FOR GRANTING THE WRIT

I

THE QUESTION INVOLVED IS ONE OF PUBLIC IMPORTANCE WHICH SHOULD BE DECIDED BY THIS COURT

The Railway Labor Act exempts from its operations

> any street, interurban, or suburban electric railway, unless such railway is operated as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power.

Various sections of the Interstate Commerce Act and related acts contain similar exemptions. See *United States* v. *Village of Hubbard*, 266 U. S. 474, 480. But the Railway Labor Act provides, in addition, that upon request of the National Mediation Board or upon complaint of any interested party the Interstate Commerce Commission is to determine after hearing whether any line operated by electric power falls within the terms of the exempting proviso. This provision enables both the elec-

tric railways and the administrative bodies charged with the administration of the statute speedily and definitely to ascertain whether or not a particular line is subject to the Act.[1]

The National Mediation Board has requested the Interstate Commerce Commission to determine whether certain electric lines, which in some respects resemble the trunk-line railroads and in other respects interurban railways, come within the proviso. The Interstate Commerce Commission, after full hearings, has made its determinations. Respondent and other carriers, which had been held by the Commission not to be interurban railways, have brought suit in the district courts to enjoin the United States Attorneys from enforcing the Railway Labor Act against them and for declaratory judgments, claiming that they were interurban railways exempt from the statute.[2] Up

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[1] The need for such an administrative determination is illustrated by the facts in *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, and *United States* v. *Chicago North Shore & Milwaukee R. Co.*, 288 U. S. 1. In the former the carrier was required to begin construction of a new line of road before it could obtain a judicial determination that it did not come within the exemption and that the construction was illegal; in the latter, a decision that the carrier was subject to the Act might have invalidated millions of dollars of securities previously issued.

[2] The cases in the district courts have been cited by this Court in its opinion in *Shannahan* v. *United States*, decided April 4, 1938, Footnote 5. In addition to the decisions of the District Court and the Circuit Court of Appeals in the present case, the question has been decided in *Hudson &*

to this time, each of the lower courts passing upon the question has completely ignored the determination by the Interstate Commerce Commission, has decided the question for itself, and has held, contrary to the determination of the Commission, that the electric railway involved was an interurban and accordingly not subject to the Railway Labor Act. In the instant case the District Court permitted the question of whether or not respondent was an interurban railway to be tried entirely *de novo* before it, and on the basis of the evidence introduced before it (as well as the evidence before the Commission), held that the respondent was an interurban. The Circuit Court of Appeals, in affirming the decision below and relying on the evidence newly adduced, has approved this procedure.

The decisions of the lower courts, of which that in the instant case is the most extreme, have resulted in paralysis of the plan established by Congress for the determination of which electric railways are subject to the Railway Labor Act. It is important that the bodies charged with the administration of that statute—the National Mediation Board and the National Railroad Adjustment Board—know what carriers are subject to their jurisdiction. They cannot await judicial determination of the question, which is dependent upon violation of the Act by the carrier, inasmuch as

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Manhattan Ry. v. *Hardy*, 22 F. Supp. 105 (S. D. N. Y.), and *Texas Electric Ry.* v. *Eastus* (N. D. Tex., decided June 4, 1936).

their function is to settle labor disputes involving carriers who may never violate the Act. Congress assumed that it had solved this problem by the authorization to the Interstate Commerce Commission.

The question here presented has importance in the administration of other statutes than the Railway Labor Act. If an electric railway engaged in interstate commerce is an interurban not subject to the Railway Labor Act, it is subject to the National Labor Relations Act.[9] Neither the agencies established under the Railway Labor Act nor the National Labor Relations Board can effectively assume jurisdiction until the carrier's status is ascertained. The same is true as to the Railroad Retirement Board and the Social Security Board, and as to the Collector of Internal Revenue in collecting the taxes imposed by the Carriers' Taxing Act and the lower taxes imposed by the Social Security Act.[10] The Railroad Retirement Act of 1937 and the Carriers' Taxing Act contain exemption provisos sub-

[9] In Section 2 (2) of the National Labor Relations Act, the term "employer" is defined so as to except "any person subject to the Railway Labor Act."

[10] The Railroad Retirement Act and the Carriers' Taxing Act amend the definition of "employment" in Titles 4 and 10 of the Social Security Act so as to exclude services performed by employees subject to the Railroad Retirement Act and Carriers' Taxing Act, respectively. 50 Stat. 317, U. S. C., Title 45, Sec. 228q; 50 Stat. 439, U. S. C., Title 45, Sec. 269.

stantially identical with that in the Railway Labor Act, each authorizing the Interstate Commerce Commission to determine which electric railways come within the exempting clause. 50 Stat. 307, U. S. C., Title 45, Sec. 228a (a); 50 Stat. 435, U. S. C., Title 45, Sec. 261 (a). It is of course important that both the electric railways and their employees be able to discover through the expeditious and simple means prescribed by Congress, and without the necessity of first violating the law, whether they are governed by the Railway Labor Act, Railroad Retirement Act, and Carriers' Taxing Act, on the one hand, or the National Labor Relations Act and the Social Security Act, on the other. It is important for the Interstate Commerce Commission to know whether its determinations as to the status of electric railways under the Railway Labor Act, and also under the Railroad Retirement Act and Carriers' Taxing Act, may be ignored by the courts.

The decisions of the lower courts and, particularly, of the Circuit Court of Appeals in this case effectively nullify the carefully designed statutory solution for these problems. It is therefore important that this Court decide whether or not, and to what extent, the determinations made by the Interstate Commerce Commission are to be controlling.

II

THE DECISION BELOW IS IN CONFLICT WITH NUMEROUS DECISIONS OF THIS COURT

A. THE SCOPE OF JUDICIAL REVIEW

In Section 1 of the Railway Labor Act, Congress specifically authorized the Interstate Commerce Commission to determine which lines operated by electric power fell within the exemption proviso for interurban electric railways. This Court has decided in cases too numerous to cite that under such circumstances [11] the decisions of the Interstate Commerce Commission may not be ignored by the courts—that they are binding, at least if supported by substantial evidence, and neither arbitrary nor capricious.[12] *E. g., Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297. The decision below conflicts with this established line of authorities. As Judge Bratton pointed out in his dissenting opinion (R. 336), the District Court did not find that the Commission

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[11] The question to be determined is not of the kind held independently reviewable by the courts in *Crowell* v. *Benson*, 285 U. S. 22, and *St. Joseph Stockyards Co.* v. *United States*, 298 U. S. 38.

[12] Whether under this statute the Commission's determination is controlling even apart from this limitation need not be considered in this petition. Cf. *Butte, Anaconda & Pacific Ry. Co.* v. *United States*, 290 U. S. 127; *Great Northern Ry. Co.* v. *United States*, 277 U. S. 172; *Buttfield* v. *Stranahan*, 192 U. S. 470.

had acted arbitrarily, capriciously, or without substantial evidence; nor did the court below make such a finding. That they did not regard themselves as subject to the ordinary limitations upon the scope of judicial review is shown by the fact that they permitted respondent to try the case *de novo*, on a new record, in the District Court."

B. THE MEANING OF "INTERURBAN ELECTRIC RAILWAY"

As is shown in the Statement, more than 80 percent of respondent's revenues are derived from the transportation of freight; indeed in 1934, the last year as to which evidence was taken, only 13.7% of its revenue was derived from passenger traffic. In *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, and *United States* v. *Chicago North Shore & Milwaukee R. Co.*, 288 U. S. 1, this Court recognized that interurban railways were lines primarily engaged in the carriage of passengers. In the *Piedmont* case, this Court pointed out that (286 U. S. at 307):

> the characteristics of street or suburban railways persisted in these interurban lines. *They also were chiefly devoted to passenger traffic* and operated single or series self-propelled cars. Many of them carried pack-

[12] The lower courts in this case seemed to treat the question of whether respondent was of was not an interurban electric railway as exclusively a question of law. In *Shaughnahan* v. *United States*, decided April 4, 1938, this Court declared that "the function of the Commission is limited to the determination of a fact."

> age freight, some also transported mail, and still fewer carload freight picked up along the line or received for local delivery from connecting steam railroads. It is clear that the phrase "interurban electric railway" *was not, in 1920, commonly used to designate a carrier whose major activity was the transportation of interstate freight in trains of standard freight cars.* [Italics supplied.]

In holding the Chicago North Shore to be an interurban railway, this Court noted that (288 U. S. at p. 10):

> The railroad was constructed to afford a fast electric passenger service between Chicago and Milwaukee and suburban passenger service into and out of Chicago. *The freight business is subsidiary to this primary function,* and is not fairly comparable to that ordinarily transacted by a standard steam railroad. *Passenger traffic, whether measured by car service or by gross earnings, heavily preponderates over interline freight business.* The main terminals serve only the passenger and merchandise freight traffic.
>
> We thus have a typical example of an interurban electric line for passenger service, which has developed, in addition, such freight traffic as could advantageously be undertaken without interfering with performance of the main purpose of the carrier. [Italics supplied.]

In the instant case the Interstate Commerce Commission held that a carrier whose major activity was the transportation of freight in stand-

and freight cars, almost two-thirds of which were interchanged with steam-railroads, was not an interurban electric railway. The District Court and the Circuit Court of Appeals have ruled to the contrary. The determination of the Interstate Commerce Commission would seem to be in accord with the prior decisions of this Court. The holdings of the lower courts are in conflict with those decisions. In any event, the Commission's determination obviously cannot be deemed arbitrary, unreasonable, or not supported by substantial evidence.

It is difficult to understand the reasoning of the majority opinions of the court below. Only with hesitation do we venture to interpret those opinions. They apparently assume that the Interstate Commerce Commission had no power to determine that respondent was not an interurban, but only to decide whether it was "part of a general steam-railroad system of transportation." This construction of the statute is plainly untenable;[14] the Commission is authorized to decide what lines operated by electric power come within the exempting proviso, and the proviso exempts from the Act "interurban" railways. Thus, the Commission necessarily possesses the power to determine whether or not a line is interurban.

The majority of the court below apparently was of opinion that there had been a course of adminis-

[14] The construction adopted by the majority of the Circuit Court of Appeals has never been suggested by counsel for respondent.

trative interpretation of similar exemption provisos showing that the Commission regarded respondent as an interurban railway. This was not the case. In the only prior case in which respondent's status was determined in a formal proceeding, respondent was held not to be an interurban railway. *Rules for Testing Other Than Steam Power Locomotives*, 122 I. C. C. 414." It is true, as the lower court pointed out, that the Commission had failed to take steps which would have brought respondent within Section 20a of the Interstate Commerce Act, even though it had knowledge

"It should be noted that Congress delegated to the Commission the authority to determine which electric railways were interurban after the Commission had for a number of years consistently held that only roads dependent upon passenger traffic for the bulk of their revenues were interurban railways. *In the Matter of the Application of the Western Pacific Railroad Company for Authority to Acquire Control of the Sacramento Northern Railway and to Purchase the Bonds of the Sacramento Northern Railroad*, 71 I. C. C. 653; *Proposed Control of Sacramento Northern by Western Pacific Railroad*, 79 I. C. C. 782; *Application of Section 15A of the Interstate Commerce Act to Electric Railways*, 86 I. C. C. 751; *In the Matter of Rules and Instructions for Inspection and Testing of Locomotives Propelled by Power Other than Steam Power*, 122 I. C. C. 414; *Proposed Construction of Lines by Piedmont & Northern Ry. Co.*, 138 I. C. C. 363; *Railway Mail Pay: In the Matter of Application of the Illinois Terminal Company*, 174 I. C. C. 796.

The choice of the Commission as the body to determine the question manifests an intention on the part of Congress that the principles established by the Commission in deciding similar cases in the past should be applicable under the Railway Labor Act.

which might have warranted the taking of such a
tion; but this inactivity is not entitled to
as an administrative precedent. The most th
can be said by respondent is that the administra
tive precedents are conflicting. With respect
this precise issue, this Court said in the *Pied*
case (286 U. S. at 312):

> Only a word need be said with respect
> the contention that governmental agenc
> have heretofore classified the railway as
> interurban electric line. It is true that
> connection with quite diverse administrativ
> functions the United States Labor Boa
> the Postmaster General, and the Interst
> Commerce Commission have classified pe
> tioner's railway as an interurban electri
> line in distinction to steam railroa
> Neither the administrative nor the statutor
> classification has, however, been uniform
> and in any event is not controlling in th
> litigation.

CONCLUSION

Wherefore, it is respectfully submitted that th
petition for a writ of certiorari to review the ju
ment of the Circuit Court of Appeals for the Te
Circuit should be granted.

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Chief Counsel,
Interstate Commerce Commission.

APRIL 1938.

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